IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff,	)	
v.	)	Case No. 4:05-cv-00329-JOE-SAJ
TYSON FOODS, INC., *et al.*, Defendants.	)	

STATE OF OKLAHOMA'S SUPPLEMENTAL BRIEF IN OPPOSITION TO "TYSON FOODS, INC.'S MOTION TO DISMISS COUNTS 4-10 OF THE FIRST AMENDED COMPLAINT"

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), by and through counsel, and respectfully submits the following supplemental brief in further opposition to Defendant Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint (DKT # 66).[1]

I. The Clean Water Act does not pre-empt the State's Oklahoma law-based claims as to non-point source pollution originating in Arkansas[2]

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[1] This Memorandum in Opposition is intended to respond not only to the Tyson Motion / Reply, but also to all of the other Poultry Integrator Defendants which have joined and / or adopted the Tyson Motion / Reply.

[2] Tyson states in its Reply, p. 5, that "Oklahoma readily concedes that the CWA preempts common law suits against point sources." This statement is wrong. The State plainly stated in its response, *see* pp. 12-13, that "[w]ith respect to point source pollution originating in Arkansas, the CWA pre-empts the State's claims based on Oklahoma law but not the State's claims based on Arkansas law." The State's position is in full accord with *International Paper Co. v. Ouellette*, 107 S.Ct. 805 (1987), which plainly holds that "[t]he Act pre-empts state law to the extent that the state law is applied to an out-of-state point source"). 107 S.Ct. at 816. Likewise, *Arkansas v. Oklahoma,* plainly states that "the only state law applicable to an interstate discharge is 'the law of the State in which the point source is located.'" 112 S.Ct. 1046, 1053 (1992) (citation omitted). Furthermore, the CWA pre-emption analysis pertains only to matters

In its Reply (DKT # 144), Defendant Tyson Foods, Inc. ("Tyson"), continues to argue that the Clean Water Act ("CWA") pre-empts the State's Oklahoma law-based claims as to non-point source pollution originating in Arkansas despite the fact the CWA contains no mandatory, comprehensive federal regulatory scheme pertaining to non-point source pollution -- an obvious prerequisite to finding pre-emption.[3] As pertains to non-point source pollution, however, no such federal regulatory scheme exists, and, as demonstated below, contentions by Tyson in its Reply to the contrary are without foundation.

The contention by Tyson in its Reply, pp. 3-6, that the CWA gives the EPA regulatory authority over non-point source pollution is wrong. *See American Wildlands v. Browner*, 260 F.3d 1192, 1197-98 (10th Cir. 2001) ("In the Act, Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution. . . . [T]he Act nowhere gives the EPA the authority to regulate nonpoint source discharges"); *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005) ("Congress clearly intended the EPA to have a limited, non-rulemaking role in the establishment of water quality standards by states") (citation and quotations omitted). The EPA agrees that it has no such authority. *See, e.g.,* 65 Fed. Reg. 43586, 43650 (July 13, 2000) ("The CWA preserves the rights of States to experiment with alternative regulatory (and

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of interstate water pollution. There can be no argument that the CWA pre-empts the application of source state law to source state pollution, irrespective of whether it is point source pollution or non-point source pollution. *See International Paper*, 107 S.Ct. at 814 ("nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State") (emphasis in original). Thus, for example, the State's Oklahoma-law based claims as to pollution originating in Oklahoma are obviously not pre-empted and are not even subject to CWA pre-emption analysis.

[3] It is axiomatic that the existence of a comprehensive mandatory federal regulatory scheme is a necessary prerequisite to a finding of pre-emption. *See, e.g., International Paper*, 107 S.Ct. 805 (finding pre-emption of affected state law to out-of-state point source on ground that CWA provides for a mandatory federal regulatory scheme for point source pollution).

non-regulatory) approaches to control nonpoint sources of pollution. The CWA does not provide specific legal authority for EPA to regulate nonpoint sources in a way that would assure the attainment of water quality standards. Such authority is reserved for the States").[4]

The contention by Tyson in its Reply, pp. 3-6, that the CWA requires the states to regulate non-point source pollution is wrong. *Defenders of Wildlife*, 415 F.3d at 1124-25 (". . . [T]he CWA does not require states to take regulatory action to limit the amount of non-point water pollution introduced into its waterways"); *American Wildlands*, 260 F.3d at 1197 ("nothing in the CWA demands that a state adopt a regulatory system for nonpoint sources") (citation and quotations omitted); Remarks of Senator Alan Simpson,[5] 133 Cong. Rec. 1568, 1590 (Jan. 21, 1987) ("We purposely avoided implementing a mandatory regulatory program for nonpoint pollution").[6]

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[4] Tyson, for example, states in its Reply, p. 4 fn. 3, that "[n]o state is compelled to adopt a nonpoint source program, but if a state does not adopt the program the EPA will." Tyson also states, p. 4, that "in the areas of both point and nonpoint source regulation, the EPA will implement both programs if a state fails to regulate consistent with the CWA." With regards to non-point source pollution, Tyson is simply wrong as to EPA regulatory authority. 33 U.S.C. § 1329(d)(3), upon which Tyson relies for this assertion, merely provides that as to states which do not prepare a state assessment report, "the Administrator shall . . . prepare a report for such State . . . ." 33 U.S.C. § 1329(d)(3) is not a grant of regulatory authority, and, in fact, such a contention is wholly inconsistent with the fact that the EPA does not have the authority to regulate non-point source pollution under the CWA.

Relatedly, Tyson in its Reply, p. 5, again in reference to 33 U.S.C. § 1329(d)(3), states that the "EPA will promulgate [a] State water assessment report . . . ." Tyson's use of the word "promulgate" overstates what the EPA will do. As noted above, the EPA merely "prepares a report for such State." *See* 33 U.S.C. § 1329(d)(3).

[5] Senator Simpson was a member of the conference committee.

[6] Senator Simpson further explained: "For the first time we have included a provision in the Clean Water Act related to non-point source pollution that comes from farm lands, timber operations, and other sources of run-off which are not considered point sources. Western and mid-western Senators worked hard to ensure that we were not beginning a new full fledged regulatory program in this regard. Instead, we provided for a voluntary program where states may participate if they so desire. When states choose to participate in the non-point source

The contention by Tyson in its Reply that "nonpoint source regulation is comprehensive," p. 2 & 3-6, and that the provisions of the CWA pertaining to the development of Total Maximum Daily Loads ("TMDLs") and water quality standards constitute a mandatory, comprehensive federal regulatory scheme, is wrong. Simply put, TMDLs and water quality standards do not constitute regulation. As explained in *City of Arcadia v. U.S. Environmental Protection Agency*, 265 F.Supp.2d 1142, 1144-45 (N.D. Cal. 2003):

> TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-executing. *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002) ("TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans.") (*citing Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984-85 (9th Cir. 1994)). A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls. *See, e.g., Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) ("Each TMDL serves as the goal for the level of that pollutant in the waterbody to which that TMDL applies. . . . The theory is that individual-discharge permits will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL."); *Idaho Sportsmen's Coalition v. Browner*, 951 F.Supp. 962, 966 (W.D. Wash. 1996) ("TMDL development in itself does not reduce pollution. . . . TMDLs inform the design and implementation of pollution control measures."); *Pronsolino*, 291 F.3d at 1129 ("TMDLs serve as a link in an implementation chain that includes . . . state or local plans for point and nonpoint source pollution reduction . . . ."); *Idaho Conservation League v. Thomas*, 91 F.3d 1345, 1347 (9th Cir.1996) (noting that a TMDL sets a goal for reducing pollutants). Thus, a TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and waterbodies.

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program they will become eligible for grants to carry out non-point demonstration and education programs. If states do not choose to participate in the program the only penalty is a lack of federal funds for on-point demonstration projects." 133 Cong. Rec. at 1591 (emphasis added). Against this backdrop, assertions by Tyson like "[g]iven the extensive obligations Congress has imposed . . ." (and the arguments that accompany them) are simply inaccurate. *See, e.g.,* Reply, p. 7.

Additionally, it should be noted that Senator Simpson's remarks cited above are entirely consistent with the State's argument that the enticement for state participation in the voluntary non-point program is eligibility for federal grant money.

See also Pronsolino v. Nastri, 291 F.3d 1123, 1140 (9th Cir. 2001) ("States must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring implementation of § 303 plans or providing for their enforcement"); *Sierra Club v. Meiburg,* 296 F.3d 1021, 1026 (11th Cir. 2002) ("The Act generally leaves regulation of non-point source discharges [sic] through the implementation of TMDLs to the states"); *Oregon Natural Desert Association v. Dombeck,* 172 F.3d 1092, 1096-97 (9th Cir. 1998) ("Nonpoint source pollution is not regulated directly by the Act . . . . [T]he Act provides no direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task") (citations omitted); *EPA: Water Quality Standards Handbook,* p. 4-8 (2nd ed. 1994) ("Section 131.12(a)(2) [of 40 C.F.R.] does not mandate that states establish controls on nonpoint sources. The Act leaves it to the States to determine what, if any, controls on nonpoint sources are needed to provide for attainment of State water quality standards"); *Natural Resources Defense Council v. EPA*, 915 F.2d 1314, 1318 (9th Cir. 1990) ("Section 319 does not require states to penalize nonpoint source polluters who fail to adopt best management practices; rather it provides for grants to encourage the adoption of such practices"); 33 U.S.C. § 1329(b) (no requirement that a state management program include regulatory limits on non-point sources).

The contention by Tyson in its Reply, pp. 7-8, that section 319(g) interstate management conferences under the CWA are mandatory is wrong. Such conferences are voluntary as to the states. *See, e.g.,* 33 U.S.C. § 1329(g) (such State may petition the Administrator to convene . . . a management conference . . . ") (emphasis added). As explained by Senator Simpson:

> I believe some clarification is needed of a subsection in the non-point provision relating to interstate conferences. The statute allows downstream states to petition the EPA Administrator to convene a management conference of all states affected by pollution from non-point sources in another state. However,

> states are not required to participate in these management conferences. There is no penalty for not participating in such management conferences. If states do choose to participate in a management conference that the Administrator convenes, states are not required to agree to any changes in their non-point source programs. If states do not agree to make changes in their non-point source programs, there is no penalty for this lack of action.
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> Participation in interstate management conferences is totally voluntary as are any agreements. The conferees discussed this provision at length and it was determined that management conferences would be provided as a vehicle for states to use in discussing pollution of a non-point nature that occurs in adjacent states. The statute is very clear that there is no forcing mechanism, nor is there a provision of penalties for states that do not wish to participate or for states that participate but that do not wish to make agreements with other states.
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> If a state chooses to reach an agreement with other states it is then expected that changes in that state's non-point pollution plan will reflect those agreements in the future. Where states are participating in a federal non-point grant program, in no case will grant monies be withheld because a state refuses to participate in a management conference, or refuses to reach agreements with other states in such a management conference.

133 Cong. Rec. at 1591 (emphasis added).

The contention by Tyson in its Reply, pp. 4-5, that "optional delegation of authority is irrelevant to the preemption analysis" is a red herring and misconstrues the State's position. As the State has consistently (and correctly) argued, the core question for purposes of the pre-emption analysis is, of course, whether there exists a mandatory, comprehensive federal regulatory scheme in the first instance sufficient to trigger pre-emption, not whether the duties under that regulatory scheme have or have not been delegated. Thus, Tyson's contention that "[t]he EPA is just as powerless to coerce states to regulate point sources as nonpoint sources," Reply, p. 4 (emphasis added), misses the point. What is relevant is whether the CWA pre-empts application of affected state law to interstate point source pollution (which the State freely admits it does). In contrast, neither the Supreme Court, nor any other court to the best of the State's knowledge, has ever held that the CWA pre-empts application of affected state law to interstate

non-point source pollution, and, further, Congress has not given the EPA regulatory authority over non-point source pollution under the CWA, so (in contrast to point source pollution) there is simply no authority for the EPA to delegate. "Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the [Clean Water] Act to regulate only the former"). *American Wildlands*, 260 F.3d at 1197 (citation and quotations omitted).

The contention by Tyson in its Reply, p. 5, that the State has voluntarily chosen to take steps to enact state law to regulate non-point source pollution somehow triggers federal pre-emption misapprehends pre-emption principles. The focus for federal pre-emption by definition must be entirely on the federal statutory scheme in question, not on some independent state action.

As noted in the State's responsive papers, there is a presumption against finding pre-emption. *International Paper Co.*, 107 S.Ct. at 811 ("courts should not lightly infer pre-emption"). "[W]e have long presumed that Congress does not cavalierly pre-empt state law causes of action. In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Lohr v. Medtronic*, 116 S.Ct. 2240, 2250-51 (1996) (citations omitted). Protection of the environment is plainly a field which the states have traditionally occupied. *See Georgia v. Tennessee Copper Co.*, 27 S.Ct. 618, 619 (1907) ("[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain"); *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) (citation omitted) ("[I]t is clear that a state may sue to protect its citizens against

'the pollution of the air over its territory; or of interstate waters in which the state has rights'"). In fact, "[t]he mere fact that Congress has enacted detailed legislation addressing a matter of dominant federal interest does not indicate an intent to displace state law entirely." *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1441 (10th Cir. 1993) (citation omitted).

Pre-emption may be found, however, "when federal legislation is 'sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.'" *International Paper,* 107 S.Ct. at 811 (citation omitted). As demonstrated above, however, the CWA contains no mandatory, comprehensive federal regulatory program pertaining to non-point source pollution. The argument that the CWA "is 'sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation'" of non-point source pollution is thus absolutely without basis. *See International Paper,* 107 S.Ct. at 811. Likewise, the absence in the CWA of any mandatory, comprehensive federal regulatory program pertaining to non-point source pollution also causes Tyson's argument that the federal common law of nuisance has been displaced to fail.[7] *See City*

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[7] Tyson cites to *Silkwood v. Kerr-McGee Corp.*, 104 S.Ct. 615 (1984). This case actually supports the State's contention that there is no pre-emption. *Silkwood* states:

> [S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

104 S.Ct. at 621. Given the foregoing, it can hardly be said Congress evidenced an intent to occupy the field of non-point source pollution regulation. Likewise, Tyson has not identified an actual circumstance where the application of Oklahoma law would actually conflict with federal law -- because, of course, there is no federal law regulating non-point source pollution. Finally, given that there is no federal law regulating non-point source pollution, assertions that

of Milwaukee v. Illinois, 101 S.Ct. 1784, 1794 (1981) (basing conclusion that federal common law had been displaced on the fact that the CWA "thoroughly addressed" point source pollution).

II. Application of Oklahoma law to non-point pollution emanating from Arkansas and causing injury and damage in Oklahoma neither violates the Commerce Clause nor the Sovereignty of Arkansas

The contention by Tyson in its Reply, pp. 11-14, that the State's Oklahoma law-based claims run afoul of the dormant Commerce Clause fails to distinguish the long line of cases holding that dormant Commerce Clause concerns are likely not even implicated by the State's common law claims. Further, Tyson fails to cogently explain how the Oklahoma laws at issue do not apply even-handedly and have anything other than an incidental effect on interstate commerce. *See Pike v. Bruce Church, Inc.*, 90 S.Ct. 844, 847 (1970). Accordingly, Tyson's dormant Commerce Clause argument must fail. *See, e.g., Jell-O Co. v. Brown*, 3 F.Supp. 132, 133 (W.D. Wash. 1926) ("The Interstate Commerce Clause of the Constitution . . . does not carry with it the right to create a nuisance . . .").

Additionally, in its Reply, Tyson fails to explain why its due process and sovereignty concerns are not adequately addressed through choice of law principles. *See Brand v. Menlove Dodge*, 796 F.2d 1070, 1076 fn. 5 (9th Cir. 1986) ("The conflict with the sovereignty of the defendant's state is not a very significant factor in cases involving only U.S. citizens; conflicting policies between states are settled through choice of law analysis, not through loss of jurisdiction"). Moreover, Tyson misunderstands the holding in *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996). *Gore* does not hold that a state does not have the power to punish a company for conduct that was lawful where it occurred but that had an impact on the state or its residents. As explained in *Young v. Masci*, 53 S.Ct. 599, 601 (1933), "[t]he cases are many in

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application of state law would stand as an obstacle to the accomplishment of the full purpose and objectives of Congress are simply not credible.

which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it. Thus liability is commonly imposed under such circumstances for . . . maintenance of a nuisance . . . ." (Citations omitted.)

Finally, it should be noted that the repeated conclusory contentions by Tyson in its reply that its actions are legal and lawful should not be credited. That is a matter to be determined at trial.

III. Conclusion

WHEREFORE, premises considered, Defendant Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint should be denied.

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